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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.	
10/077,917	02/18/2002	Ronald W. Ignatius	77054-9023-01	2643	
7590 12/31/2003			EXAMINER		
Casimir F. Las		JOHNSON III,	JOHNSON III, HENRY M		
Michael Best & 100 East Wiscon		ART UNIT	PAPER NUMBER		
Milwaukee, WI	53202-4108	3739			
			DATE MAILED: 12/31/2003	8.	

Please find below and/or attached an Office communication concerning this application or proceeding.

Application No.   Application No.   Applicant(s)   CINATIUS ET AL					51					
## Examiner ## Henry M Johnson, III   3739  **The MAILING DATE of this communication appears on the cover she 1 with the correspondence address  Period for Repty  A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.  **Examinors of time may be available under the provisions of 37 CPR 1.736(a). In no event, however, may a reply be likely filled.  **Extendions of time may be available under the provisions of 37 CPR 1.736(b). In no event, however, may a reply be likely filled.  **Extendions of time may be available under the provisions of 37 CPR 1.736(b). In no event, however, may a reply be likely filled.  **Extendions of time may be available under the private in the maile of privations and the privation of the private specified above. In the maile of date of private specified above. In the maile of the privation of the form 18 the private specified above. In the private private specified and private specified above. In the private private specified and priva	.(	Application No.	( A	applicant(s)						
Henry M Johnson, III   3739	Office Action Cummon.	10/077,917	0	GNATIUS ET AL.						
Period for Reply  A SHORTEND STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.  - Extensions of time may be available used the provision of 30° CFR 1.136e). In no event, however, may a reply be timely field after EX (8) MONTHS from the mailing date of this communication. It is provided in the EX (8) MONTHS from the mailing date of this communication in the EX (8) MONTHS from the mailing date of this communication. It is provided in the EX (8) MONTHS from the mailing date of this communication.  - Failuse is reply within the set or extended period for reply will, by states, cause the application to become ABANDONED (35 U.S. C. §133.)  - Any reply received by the Officia better than these montains date the mailing date of this communication, even at timely filled, may reduce any simple plants team adjustment. See 3 T CFR 1.74(b).  Status  1) Seeponshive to communication (s) filled on 14 October 2003.  2a) This action is FINAL.  2b) This action is non-final.  3.) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213.  Disposition of Claims  4) Claim(s) 1-6.8.9 and 15 is/are pending in the application.  4a) Of the above claim(s) 86-96 is/are withdrawn from consideration.  5) Claim(s) is/are allowed.  5) Claim(s) is/are allowed.  6) Claim(s) 1-6.8.9 and 15 is/are rejected.  7) Claim(s) is/are objected to by the Examiner.  10) The specification is objected to by the Examiner.  10) The drawing(s) filled on is/are: a) accepted or b) objected to by the Examiner.  Application Papers  9) The specification is objected to by the Examiner.  10) The oath or declaration is objected to by the Examiner.  10) The oath or declaration is objected to by the Examiner.  10) The oath or declaration is objected to by the Examiner.  10) The continued of the control of the information of the order of the order of the order of the order of the or		Examiner	A	art Unit						
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Art Unit: 3739

## R sp nse to Arguments

Applicant's arguments filed 10/14,2003 have been fully considered but they are not persuasive. The inclusion of a known formula for relating total energy and time is not patentable nor does it add to the structure of a device.

### Election/Restrictions

Newly submitted claims 86-96 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 1-6, 8, 9, 15, drawn to Surgery, light application, classified in class 607, subclass 088.

II. Claims 86-96, drawn to Surgical methods, classified in class 128, subclass 898.

Inventions I and II are related as process and apparatus for its practice. The inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.05(e)). In this case the apparatus can be used to stimulate plant growth, a significantly different process than treating mucositis.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 86-96 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 1-6, 8, 9, 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is indefinite for citing a positioning relative to a patient that does not affect the device structure. The examiner suggests replacing "positioned" with "adapted to be positioned".

## Claim Rejections - 35 USC § 102

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-6, 8, 9 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent 5,278,432 to Ignatius et al. Ignatius et al teaches a device for providing radiant energy that includes an LED array (optoelectric device) in a housing (Fig. 5), a fan (Fig. 5, # 40) and heat sink (Fig. 5, # 36) for cooling with wavelengths from 620 to 680 nm and/or 700-760 nm (Col. 2, lines 5-7). These wavelengths approximate 688 nm. The housing includes a glass cover plate (Col. 5, line 6) and is interpreted as being portable having no permanent supports shown.

Regarding claim 6, Ignatius teaches the device for enhancing plant growth and irradiating other types of living cells (Col. 1, lines 63-64). This implicitly meets the applicant criteria for threshold of biostimulation.

Regarding claim 5, the radiation can yield any energy density level given enough time.

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#### Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Henry M Johnson, III whose telephone number is (703) 305-0910. The examiner can normally be reached on Monday through Friday from 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Linda C Dvorak can be reached on (703) 308-0994. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0858.

Henry M Johnson, III

Patent Examiner

Art Unit 3739

Hmj

IDA C. M. DVORAK SUPERVISORY PATENT EXAMINER

**GROUP 3700**